

2012 WL 6013343 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

STATE OF KANSAS, Plaintiff/Appellee,
v.
Norvelle L. AHART, Defendant/Appellant.

No. 12-108086-A.
October 23, 2012.

Appeal from the District Court of Johnson County
Honorable Stephen R. Tatum, District Judge
District Court Case No. 10CR603
Oral argument 15 minutes

Brief of Appellant

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***ii TABLE OF CONTENTS**

Table of Authorities	iii
Nature of Case	1
Statement of Issues	1
Statement of Facts	1
Issue 1: The Court erred in denying Mrs. Ahart's motion to dismiss based upon the statute being unconstitutional vagueness	3
Arguments and Authorities	3
Conclusion	7

***iii TABLE OF AUTHORITIES**

Cases	
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601, 608 (1973) (quoting <i>Grayned v. City of Rockford</i> , 408 U.S. 104, 108(1972)	4
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-28 (1972)	4
<i>Kolender v. Lawson</i> , 461 U.S. 352, 357, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903, 909 (1983)	6,7
<i>State v. Ashton</i> , 175 Kan. 164, 262 P.2d 123 (1953)	5
<i>State v. Garcia</i> , 282 Kan. 252, 260, 144 P.3d 684 (2006)	3
<i>State v. Kirby</i> , 222 Kan. 1, 563 P.2d 408 (1977)	5
<i>United States v. National Dairy Corp.</i> , 372 U.S. 29, 9 L.Ed.2d 561, 83 S.Ct. 594 (1963)	4
Kansas statutes	
<i>K.S.A. 21-3437</i>	1, 3, 6

***1 NATURE OF THE CASE**

A jury convicted Norvelle Ahart of two counts of Mistreatment of a Dependent Adult, in violation of [K.S.A. 21-3437](#). This District Court sentenced her to 12 months imprisonment on each count, to run consecutively. The Court granted probation for

24 months with the condition that Mrs. Ahart first serve 30 days “shock” time. Mrs. Ahart filed a timely notice of appeal, posted an appeal bond and remains at liberty pending appeal.

STATEMENT OF ISSUES

Issue 1: The Court erred in denying Mrs. Ahart's motion to dismiss based upon the statute being unconstitutionally vague.

STATEMENT OF FACTS

On March 9, 2010, Mrs. Ahart was charged with two counts of violating [K.S.A. 21-3437](#). (R. I, 9-10). The charges, which were later divided into three separate counts by way of an amended complaint, related to her involvement with Burks Alden Smith from October 20, 2000 through February 18, 2010. (R. I, 7-8). The State alleged that during this time period, Mrs. Ahart took “unfair advantage” of Mr. Smith’s physical or [*2](#) financial resources by use of, among other things, “undue influence.” (R. I, 7-8).

In December of 2010, Mrs. Ahart filed a motion to dismiss the charges, arguing that the statute under which she was charged, [K.S.A. 21-3437](#) was unconstitutionally vague. (R. I, 4). Mrs. Ahart argued that the statute, because of its undefined terms, both failed to give adequate warning as to what conduct was prescribed and allowed for arbitrary enforcement. A hearing on the motion was held on January 7, 2010. (R. V, 1-14). At this hearing, Mrs. Ahart offered the preliminary hearing testimony but no other argument on the pleadings. (R. V, 5). The State, who had not yet filed a written response to the motion, argued that both the complained of terms: “undue influence” and “unfair advantage”; were easily understood and withstood a vagueness challenge. (R. V, 4-5).

The Court conducted a two-step vagueness analysis and concluded that the complained of terms were “put in perspective” by a reading of the complaint and were not so vague as to violate due process or fundamental fairness. (R. V, 7-8). This ruling is the sole basis for this appeal. As such, the specific factual allegations that comprised the charges have not been set forth here.

*3 ARGUMENTS AND AUTHORITIES

Issue 1: The Court erred in denying Mrs. Ahart's motion to dismiss based upon the statute being unconstitutionally vague.

Standard of Review

When the question involves a trial court's denial of a motion to dismiss on a strictly legal ground, review is unlimited. [State v. Garcia](#), 282 Kan. 252, 260, 144 P.3d 684 (2006).

Argument

On March 9, 2010, the State charged Mrs. Ahart in a two-count complaint (R. I, 9-10) with violations of [K.S.A. 21-3437](#). The complaint alleged in Count I that from October 20, 2000 until June 30, 2007, Mrs. Ahart took “unfair advantage” of Burks Alden Smith’s physical or financial resources by use of “undue influence, coercion, harassment, duress, deception, false representation or false pretense”, all amounting to the crime of mistreatment of a dependent adult. Count II contained the same charge, but with offense date ranging from July 1, 2007 until February 18, 2010. The complaint, which tracked the language of the statute, did not define either “unfair advantage” or “undue influence.” (R., 9-10).

[*4](#) On May 2, 2011, a second amended complaint, which had been amended by interlineation during the trial and was the complaint on which the charges were presented to the jury, was filed. This complaint, alleged all of the same conduct and the

same total date range as in the original complaint but broke the offense into three distinct time periods. (R., 7-8). Like the original complaint, it tracked the statutory language and did not provide definitions of either “unfair advantage” or “undue influence.” (R., 7-8).

Although the Supreme Court has recognized that “words inevitably contain germs of uncertainty and ... there may be disputes over the meanings ...,” they have acknowledged that in order to withstand constitutional challenge, a statute must be “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)(quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Due Process requires that a statute must “give adequate warning of what activities it proscribes,” and “set out ‘explicit standards’ for those who must apply it” in order to meet constitutional due process standards. *Broadrick* at 607 (1973). A decade before its pronouncement in *Broadrick*, the Court stated in *United States v. National *5 Dairy Corp.*, 372 U.S. 29, 9 L.Ed.2d 561, 83 S.Ct. 594 (1963), “[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”

Kansas indicated minimum due process considerations in *State v. Ashton*, 175 Kan. 164, 262 P.2d 123 (1953). There, the Court stated that, “[a] criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning *and differ as to its application*, lacks the first essential of due process of law.” *Id.* at 169 (emphasis added). The Court later reiterated this position in *State v. Kirby*, 222 Kan. 1, 563 P.2d 408 (1977), stating:

The test whether a statute is so vague and indefinite and therefore fails to inform the accused of the nature and cause of the charge against him as required by Section 10 of the Kansas Bill of Rights is... whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice... A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process.

Id. at 4.

The *Kirby* court announced, “[a]t its heart the test for vagueness is a commonsense determination of fundamental fairness.” *Id.* The Court also stated that in determining whether a statute is void for vagueness, a court *6 should consider “not only the specific statute... but also the criminal code in its entirety, since it was designed and enacted as a comprehensive code with interrelated sections.” *Id.* at 6.

As previously noted, the statute under which Mrs. Ahart was charged and convicted, *K.S.A. 21-3437*, defines neither “unfair advantage” nor “undue influence.” These terms are not commonly defined and therefore leave the statute in question so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application and the conduct prescribed.

Moreover, because of its failure to define these terms, the statute is ripe for arbitrary enforcement. The Supreme Court has held, “Where the legislature fails to provide minimal guidelines [for government law enforcement], a criminal statute may permit ‘a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903, 909 (1983); see *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-28 (1972). Allowing law enforcement to pursue a case because a particular course of conduct seems, to them, “unfair” - a term that is certainly in the eye of the beholder--or because a person’s influence seems, to them (or to estranged *7 but vocal heirs of the alleged victim), “undue”, is precisely the kind of action about which *Kolender* and its progeny warn. A prosecution on these terms cannot withstand Due Process scrutiny and must be overturned.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, the Court should vacate Mrs. Ahart's convictions.

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